No. 88-1639

Supreme Court, U.S.
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In The Supreme Court of the United States
October Term, 1988

IN THE MATTER OF THE ESTATE OF E. DAVIS WERNICK, Deceased

MITCHELL C. MACKS,

Petitioner,

v.

SAMUEL WERNICK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

BRIEF IN OPPOSITION FOR RESPONDENT

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Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Samuel Wernick respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Appellate Court of Illinois, First Judicial District. That decision affirmed the contempt finding entered against Mitchell Macks. The appellate court reviewed the record and concluded that Macks was afforded every safeguard of due process, including a hearing before an impartial judge properly

conducted by opposing counsel, and that Macks was found guilty of contempt by "overwhelming evidence". *In re Estate of Wernick*, 176 Ill. App. 3d 153, 160, 530 N.E.2d. 1127, 1131 (1st Dist. 1988). Pet. App. at A-5, A-7.[1]

STATEMENT OF THE CASE

Respondent submits this statement pursuant to Rules 22.1 and 34.2 to correct substantial inaccuracies and omissions in the statement submitted by the petitioner.

The Underlying Probate Court Proceedings

Garson Wernick, Executor of the Estate of E. Davis Wernick and the elder of the decedent's two sons, and Samuel Wernick[2] in 1979 brought citation proceedings in the Circuit Court of Cook County Probate Division against Mitchell C. Macks.

Macks is a licensed attorney. The decedent was a physician. Macks and the decedent were cousins, neighbors and had a close personal relationship. Macks acted as the decedent's attorney and invested in a number of properties with the decedent.

The citation proceedings were brought to discover information concerning Macks' financial dealings with the decedent and to recover the decedent's one-half share in two parcels of real estate which the decedent co-owned with Macks and which Macks claimed the decedent assigned to him in 1977 just days before the decedent's death from cancer. Macks claimed he gave the decedent a promissory note in exchange for the assignment, but the note was never found and Macks produced no copy of the note. The Estate claimed that no note ever existed, that Macks gave the decedent no consideration for the assignment, and that the Estate was entitled to the decedent's share of the property or its value.

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[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.," respectively.

[2] Garson Wernick, Executor and Samuel Wernick are sometimes hereinafter collectively referred to as the "Estate". Samuel Wernick is hereinafter referred to as "Wernick".

Macks' 1982 *Ex Parte* Communication

The citation proceedings were presided over by Probate Court Judge Henry A. Budzinski. (R. 126.) On November 16, 1982, while the citation proceedings were pending, Macks entered the chambers of Judge Budzinski to speak with him *ex parte* about the citation proceedings. (R. 130.) On November 18, 1982, in open court, while Macks was on the witness stand in the citation proceedings, Judge Budzinski directly admonished Macks for engaging in that *ex parte* communication:

> THE COURT: And let me indicate on the record Mr. Macks was in my office Tuesday, wanted to know when this was all going to be over and why he's being brought in the Court. I told him he's got a lawyer; the lawyer will advise him. It's improper for you to ask the Judge any questions in the court or outside of Court, sir; as a lawyer you should know that.
>
> THE WITNESS: Why –
>
> THE COURT: You put the Court in an embarrassing position by doing that.

(R. 510-511.) When Judge Budzinski concluded his admonition, Macks responded "shall I continue to be harrassed and not protest?" (R. 511.) Judge Budzinski told Macks it was not to happen again. (R. 130.)

The Judgment In The Recovery Citation Proceeding

The recovery citation was tried in December 1984. The probate court ruled in January 1985 that Macks had breached his fiduciary duty to the decedent and ordered Macks to pay to the Estate the decedent's share of the proceeds from the sale of one of the parcels of real estate which Macks sold after the decedent's death, plus prejudgment interest at the statutory rate of 5% for vexatious delay, and to transfer to the Estate the decedent's beneficial interest in the other parcel of real estate which Macks retained. (C. 68, R. 132, 627-628.) After the judgment was entered, the probate court approved, over the Estate's objection, an unsecured letter of credit issued by a local bank which Macks controls to stand as Macks' appeal bond. (R. 133.)

Appeals From The Judgment

Cross-appeals were taken to the Illinois Appellate Court. (C. 69.) In its decision in the cross-appeals from the judgment on the recovery citation, the appellate court affirmed the probate court's ruling that Macks had breached his fiduciary duty to the decedent, affirmed the relief granted to the Estate, and also held that the Estate was entitled to further relief in the form of prejudgment interest at the prime rate, punitive damages and attorney fees and expenses pursuant to § 2-611 of the Illinois Code of Civil Procedure (which, like Fed. R. Civ. P. 11, sanctions litigants for false pleadings). *In Re Estate of Wernick*, 151 Ill. App. 3d 234, 502 N.E.2d 1146 (1st Dist. 1986).

Macks petitioned the Illinois Supreme Court for leave to appeal, which was granted. 114 Ill. 2d 546, 508 N.E.2d 737. In the Illinois Supreme Court, Macks conceded that he had breached his fiduciary duty to the decedent. Macks appealed only from the appellate court's enhancement of the relief granted to the Estate. The Illinois Supreme Court affirmed the appellate court's award of prime rate interest, holding that it was in lieu of statutory interest, and reversed the appellate court's awards of punitive damages, attorney fees and expenses. *In re Estate of Wernick*, 127 Ill. 2d 61, 535 N.E.2d 876 (1989).

The Circuit Court Of Cook County Rule Prohibiting *Ex Parte* Communications

On February 1, 1985, shortly after Judge Budzinski entered judgment against Macks in the recovery citation proceeding, Circuit Court of Cook County Rule 17 went into effect, prohibiting any attorney from engaging in *ex parte* communications with any judge in connection with any matter pending before that judge. (R. 174.) Circuit Court Rule 17.1 provides:

> No judge shall permit and no lawyer shall engage in *ex parte* communications, unless allowed by law, in connection with any matter pending before said judge.

Circuit Court Rule 17.2(b) provides that in the event an *ex parte* communication occurs:

> If a hearing is not scheduled within two full court days of said communication, the lawyer who has initiated

said communication shall promptly serve a written summary of the contents of said communication on all parties of record and the judge.

Macks' 1986 *Ex Parte* Communication

After the entry of the judgment on the recovery citation and approval of the objectionable letter of credit as Macks' appeal bond, the probate court continued to retain jurisdiction over aspects of the citation proceedings and the parties while the cross-appeals were pending. (R. 75-76, 139, 145-147, 151.) In May 1986, Macks *again* entered Judge Budzinski's chambers and engaged him in another *ex parte* communication relating to the renewal of the letter of credit. (C. 70, R. 126, 134-136.) As mentioned above, the Estate had objected to the letter of credit when it had been tendered initially as the appeal bond, thus Macks could anticipate an objection to its renewal. Nevertheless, Macks did not notify the other parties or their counsel that he was going to speak to Judge Budzinski about the renewal of the letter of credit. After the *ex parte* communication, Macks did not serve upon the parties or their counsel a written summary of the *ex parte* communication as required by Circuit Court Rule 17.2(b). (R.3.) Judge Budzinski's office notified the attorney for the Executor that the *ex parte* communication had occurred. (R. 2, 630.)

Initiation Of The Contempt Proceeding

On June 2, 1986, Wernick filed a Motion for Rule to Show Cause why Macks should not be held in contempt. (C. 7-9.) Because Judge Budzinski was a witness to Macks' successive *ex parte* communications, Wernick simultaneously filed a Motion for Change of Venue. (C. 10-12.) The Motion for Rule to Show Cause thereupon was transferred to Judge Benjamin E. Novoselsky, the Presiding Judge of the Probate Division. (C. 18.)

Pre-Trial Proceedings

Macks filed a Motion to Strike and Dismiss the Motion for Rule to Show Cause. (C. 24-27.) Macks filed authorities in support of his motion. (C. 33-34.) After a hearing, Judge Novoselsky denied Macks' Motion to Strike and Dismiss. (C. 29.)

On August 8, 1986, a Rule to Show Cause issued against Macks. (C. 35.) On October 6, 1986, Macks filed a Motion to Strike

the Rule to Show Cause. (R. 40-42.) On October 10, 1986, leave was granted to file an Amended Rule to Show Cause. (C. 44.) An Amended Rule to Show Cause was filed on November 13, 1986. (C. 45-53.) Macks then filed a Motion to Strike certain portions of the Amended Rule to Show Cause. (C. 56-58.) The Amended Rule to Show Cause was further amended on December 22, 1986. (C. 59.) On December 23, 1986, Macks filed an Answer to Amended Rule to Show Cause in which he *denied* the charges. (C. 60.)

The Contempt Hearing

An evidentiary hearing under the standards for indirect criminal contempt was held on February 18, 1987, at which time Judge Novoselsky took evidence, admitted exhibits and heard argument of counsel. (C. 66.) Judge Budzinski testified as a witness at the contempt hearing. (R. 125.) Judge Budzinski testified that Macks is a lawyer admitted to practice in the state of Illinois and a party to proceedings pending before him. (R. 136.) Judge Budzinski testified that Macks' engaged him in the November, 1982 *ex parte* communication and that he admonished Macks. (R. 131.) Judge Budzinski testified that notwithstanding the prior admonition, Macks entered Judge Budzinski's chambers in May, 1986 and engaged Judge Budzinski in another *ex parte* communication concerning the renewal of the letter of credit that stood as Macks' appeal bond. (R. 134-137.)

Although Macks, in his Answer to Amended Rule to Show Cause, had *denied* the charges rather than standing strictly on his Fifth Amendment right, Macks elected not to testify at the contempt hearing. On February 23, 1987, Judge Novoselsky found Macks in contempt of court. (C. 71.)

The Aggravation And Mitigation Hearing

Before sanctioning Macks on the contempt finding, Judge Novoselsky held an aggravation and mitigation hearing on June 10 and 12, 1987. (R. 194, 286.) Macks testified as a witness at that hearing. Macks *admitted* that he entered Judge Budzinski's chambers in May, 1986 and engaged Judge Budzinski in an *ex parte* communication concerning renewal of the letter of credit that stood as Macks' appeal bond. (R. 249, 257, 259.) (Macks had previously *denied* that charge.) (C. 60, R. 251-252.) Macks *admitted* that he entered Judge Budzinski's chambers in

November, 1982 and engaged Judge Budzinski in a prior *ex parte* communication concerning the citation proceedings. (R. 265.) Macks *admitted* being admonished by Judge Budzinski after the November, 1982 *ex parte* communication. (R. 261-262).

Macks' Demeanor Before The Court

During the aggravation and mitigation hearing, Macks displayed a demeanor disrespectful to the Court and counsel. (R. 239, 264-265, 268, 271, 278-279, 282, 400A, 401.) Judge Novoselsky repeatedly admonished Macks for the nature of his responses to questions of counsel. (R. 264-265, 268, 271, 278-179, 282, 400A.) Even in response to a question from *his own counsel* regarding where Macks had grown up, Macks testified that he had still not grown up. (R. 239.)

Previously, Macks had been warned by Judge Budzinski numerous times for his improper remarks during the citation proceedings. (R. 299, 301, 306, 492, 504, 522, 523.) Judge Budzinski repeatedly asked counsel for Macks to admonish his client. (R. 299, 504, 522.) At one point Macks, while on the witness stand, called one of the attorneys for Wernick a "schmuck." (R. 305-306.) When Judge Budzinski admonished him, Macks responded "You mean I can't use lip movement." (R. 306) At another point, the following occurred:

THE WITNESS: Judge —

THE COURT: You have to answer.

MR: HERZOG: Just answer the question.
(Attorney for Macks)

THE COURT: You have to answer.

THE WITNESS: Would I be in contempt if I did something physical?

MR. HERZOG: Just answer the question.

THE COURT: You would be in contempt talking that way. Answer the question.

THE WITNESS: No.

(R. 622.)

The Contempt Sanctions

Judge Novoselsky observed that Macks is an individual who has no regard or respect for rules of court or attorney conduct. (R. 401.) Judge Novoselsky stated:

> In deciding what sanctions should be levied . . . the Court would have to evaluate the conduct of Mitchell Macks before this court during the hearings on aggravation and mitigation as well as the evidence admitted in [the] hearing on the rule to show cause.
>
> For this Court to believe that Mr. Macks feels remorse for his actions in violating the specific admonitions and rules previously stated, his conduct on the witness stand is of importance to this trier of facts.
>
> On numerous occasions in Mr. Macks' testimony as a witness before this court, the court had to admonish him for his behavior in his response to questions, and questioning by Counsel. This court observed his demeanor and his conduct before this court, and weighing it against the testimony of Rabbi Novick, and Rabbi Kroll [Macks' son-in-law and Judge Novoselsky's rabbi], and Mr. Harry Abrams, it seems as if the witnesses testifying in mitigation were discussing another individual, not the individual on trial.
>
> He may be a charitable, loving father, a pillar of his synagogue, but [he is] also an individual who has no regard or respect for rules of the court or attorneys' conduct. [He] may not have been an active . . . practitioner of the law but he is not a novice to court appearances or procedures.

(R. 400-401.)

On June 19, 1987, Judge Novoselsky ordered Macks to pay $500 into the Court's registry; to serve 50 hours of community service to a charitable organization; and to pay reasonable attorney fees related to the contempt proceeding. (C. 108-109, R. 401, Pet. App. D.)

Post-Trial And Appellate Proceedings

On July 15, 1987, Macks filed a post-trial motion asking the court to vacate the contempt finding and dismiss the charge, or in the alternative grant a new trial. (C. 111-113.) After a full hearing on Macks' post-trial motion (R. 406-444), the motion was denied on August 11, 1987. (C. 116, R. 446-460, Pet. App. E.) Macks appealed, and the Illinois Appellate Court affirmed the contempt finding and sanction. *In Re Estate of Wernick,* 176 Ill. App. 3d 153, 530 N.E.2d 1127 (1st Dist. 1988). Macks' petition to the Illinois Supreme Court for leave to appeal was denied. 124 Ill. 2d 555, 535 N.E.2d 922 (1989).

REASONS FOR DENYING THE WRIT

THE CONTEMPT PROCEEDING WAS PROPERLY CONDUCTED IN ACCORDANCE WITH ILLINOIS LAW AND MACKS WAS NOT DEPRIVED OF ANY PROCEDURAL SAFEGUARD TO WHICH HE WAS ENTITLED

A. The Contempt Proceeding Was Properly Conducted

1. The Circuit Court of Cook County *Ex Parte* Communications Rule

Macks was found in contempt for repeatedly engaging Judge Budzinski in *ex parte* communications, despite having been admonished by the judge not to do so, and in violation of the Court's *ex parte* communications rule.

Circuit Court of Cook County Rule 17 prohibiting *ex parte* communications was adopted by that Court under the cloud of "Operation Greylord", a federal investigation into corruption in that County's judicial system that led to the indictment and conviction of a number of judges and lawyers. Rule 17 is an attempt to protect the judiciary from lawyers and parties who would engage in *ex parte* communications, and to restore both

integrity and the appearance of integrity to the Cook County judicial system.[3]

Professor Lousin, who served at the appointment of the Administrative Office of the Illinois Courts as Reporter for the Judicial Ethics Committee of the 1987 Associate Judges Seminar, has written:

> The recent Greylord investigation has uncovered not only bribery, but also what most citizens of Illinois already knew: there are lawyers and litigants who virtually try to camp in a judge's chambers. The problem of *ex parte* communications, especially those clearly designed to influence the judge's rulings in a case he is currently hearing, is most acute in Chicago, but it is known in other parts of Illinois, too.

Lousin, *The New Ex Parte Communications Rule in Illinois: A Step Forward?* 19 *Loy. U. Chi. L.J.* 1031 (1988).

2. Illinois Courts Approve of Contempt "Prosecution" By Counsel For A Litigant

Counsel for Wernick followed a long tradition of established Illinois precedent in "prosecuting" Macks for contempt. In Illinois, an indirect criminal contempt may be "prosecuted" by counsel for a litigant or by an *amicus curiae* appointed by the court as well as by the state's attorney. *Marcisz v. Marcisz,* 65 Ill. 2d 206, 210, 357 N.E.2d 477, 479 (1976), following *People v. Goss,* 10 Ill. 2d 533, 14 N.E.2d 385 (1957); *47th & State Currency, Etc. v. B. Coleman Corp.,* 56 Ill. App. 3d 229, 235, 371 N.E.2d

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[3] Effective January 1, 1987, the Illinois Supreme Court adopted a similar rule, Rule 63(A) (4) of the 1987 Illinois Code of Judicial Conduct, which provides as follows:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, a full right to be heard according to law, and, except as authorized by law, shall not permit *ex parte* or other communications concerning a pending or impending proceeding.

The Committee Commentary makes it clear that the drafters used ABA Model Canon 3(A) (4) as their starting point. Ill. S. Ct. R. 63, *Ill. Ann. Stat.* ch. 110A, para. 63 (Smith-Hurd Supp. 1987) (Committee Commentary to Rule 63).

294, 299 n.3 (1st Dist. 1977). *See also* Burr, *The Law of Contempt in Illinois,* 19 *Loy. U. Chi. L.J.* 827, 832 (1988).

In a leading Illinois case in which the defendants were found in contempt, fined $5,000 and assessed $45,555 in attorney fees for violating an injunction against violation of a covenant not to compete, the same law firm (Winston & Strawn) now representing Macks on his petition for certiorari "prosecuted" the criminal contempt and was awarded the attorney fees. *Frank B. Hall & Co., Inc. v Payseur,* 99 Ill. App. 3d 857, 425 N.E.2d 1002 (1st Dist. 1981). In that case, the reviewing court applauded counsel who "prosecuted" the contempt, stating that "[t]he private litigant who brings the fact of an indirect contempt, civil or criminal in nature, before the court, performs a valuable service to the court." 99 Ill. App. 3d at 862, 425 N.E.2d at 1006. It was in accordance with this line of Illinois precedent that Wernick's counsel moved for a rule to show cause and, once that motion was granted, acted as the proponent in the contempt hearing.

3. Macks Received A Fair Hearing

The Illinois Appellate Court reviewed Macks' contention that he was deprived of due process because opposing counsel in the underlying probate proceeding "prosecuted" the contempt proceeding, and stated:

> In Illinois, indirect criminal contempt proceedings may be instigated by private counsel. (citation omitted). By labelling opposing counsel "prosecutors", Macks raised issues both inapplicable in the instant case *and altogether absent:* the appearance of unfairness, possible misrepresentation of facts, and the difficulty of having a "prosecutor" with a proprietary interest in the outcome of the contempt hearing.
>
> * * *
>
> *[t]he hearing, being on a motion by the opposing [party] in the underlying case, was properly conducted by [the opposing party's] counsel.* Further, Macks enjoyed every due process safeguard.

In Re Estate of Wernick, 176 Ill. App. 3d at 158-160, Pet. App. at A-5 - A-7 (emphasis added).

The record of the contempt proceeding demonstrates that Macks was afforded every procedural right available to him and more. An impartial judge presided over the contempt proceeding. (On *Wernick's,* not Macks', motion, Judge Budzinski, whom Macks had engaged in the *ex parte* communications, recused himself and the chief judge of the Probate Division presided over the contempt proceeding.) Macks was vigorously represented by counsel at all stages of the contempt proceeding.

An entire year was devoted to the contempt proceeding. Even prior to the issuance of the Rule to Show Cause, Macks was allowed to challenge the Motion for Rule to Show Cause, via a Motion to Strike and Dismiss which was heard and ruled upon. Macks next challenged the Rule to Show Cause upon its issuance, which was amended. Thereafter, in response to Macks' further challenges, the court ordered further changes to the Amended Rule to Show Cause. Macks next had an opportunity to file an answer, which he did, and a full hearing was conducted at which Macks availed himself of his Fifth Amendment right.[4] Before a sanction was imposed on the contempt finding, an aggravation and mitigation hearing was conducted at which Macks chose to testify and call witnesses.

Due process was clearly afforded to Macks. The Illinois Appellate Court, after reviewing the record, observed that Macks "was afforded every safeguard of due process" and concluded that "Macks can make no tenable argument that he was deprived of due process." 176 Ill. App. 3d at 158, Pet. App. at A-5. The appellate court catalogued some of those due process safeguards:

> Macks had timely and sufficient notice of the proceeding. He was afforded a hearing on the merits of the

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[4] At no time prior to the entry of the contempt finding did Macks raise any challenge to Wernick's counsel as the "prosecutor" of the contempt charge. Macks first raised the issue of the "interested prosecutor" a month after the contempt hearing and the entry of the contempt finding, in a post-trial motion filed during the aggravation and mitigation hearing concerning the sanction to be imposed. In Illinois, when an issue is first raised in a post-trial motion, the reviewing court need only determine whether the trial court abused its discretion in denying the motion. The Illinois Appellate Court held that there was no abuse of discretion. 176 Ill. App. 3d at 158, Pet. App. at A-5.

> issue before an impartial judge. He was given a second hearing on aggravation and mitigation. He enjoyed adequate and able representation at both hearings. He enjoyed the privilege against self-incrimination. All these safeguards were provided before any deprivation of liberty or property.

176 Ill. App. 3d at 158, Pet. App. at A-5.

4. There Is No Due Process Right To A Disinterested Prosecutor In State Court Petty Contempt Proceedings

There was *never* any suggestion that Macks should be imprisoned for his conduct. In deference to Macks' age, "prosecuting" counsel specifically requested that the court not consider imprisonment. (R. 371.) This is not the "overzealous prosecutor" Macks now attempts to portray to this Court. The purpose of bringing the Motion for Rule To Show Cause was stated by Wernick's counsel in his closing remarks:

> . . . we have to go on litigating this case against Mr. Macks . . .we want to know that he will not violate court rules, that he will follow the orders of court, that he will conduct himself as a professional, a member of our profession.

(R. 371-372.)

As set forth above, Macks cannot in good faith contend that he did not receive a fair hearing. Nor can Macks point to any actual prejudice arising from the conduct of Wernick's counsel. Macks therefore contends that the "prosecution" of a state court petty contempt by counsel for the contemnor's opponent in underlying civil litigation is a *per se* due process violation.

Criminal contempt proceedings have a quasi-criminal nature to which the due process guarantee of fundamental fairness, rather than the provisions of the Bill of Rights apply. *United States v. Bukowski,* 435 F.2d 1094, 1101 (7th Cir. 1970), *cert. denied,* 401 U.S. 911 (1971). This Court has recognized that "criminal contempt is a petty offense unless the punishment makes it a serious one." *Bloom v. Illinois,* 391 U.S. 194, 198 (1968). Because Macks was not sentenced to imprisonment in this case

and imprisonment was not requested, this is not a serious criminal contempt as was the case in *Bloom v. Illinois*. While this Court has mandated that certain procedural protections are available to criminal contemnors, this Court has never recognized a due process right to a disinterested prosecutor in state court petty contempt proceedings. The Due Process Clause of the Fourteenth Amendment does not require that states discontinue the long-established practice of permitting petty contempts to be "prosecuted" by opposing counsel in civil litigation.

5. The Cases Cited By Macks Are Readily Distinguishable

Macks' reliance on *Marshall v. Jerrico*, 446 U.S. 238 (1980) is to no avail. The "neutrality in adjudicative proceedings" discussed in that case relates to the need for an impartial *judiciary*. Indeed, the Court in *Marshall* observed that the strict requirements of neutrality are not the same for a prosecutor as they are for a judge. 446 U.S. at 248-250. Here, Wernick, Macks' opponent, moved for the recusal of Judge Budzinski and the contempt proceeding was heard by Judge Novoselsky to insure that the requirement of a neutral and impartial judiciary was met.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the plaintiff students were suspended from school without a hearing. Macks was afforded a full hearing. In *Joint-Anti Fascist Comm. v. McGrath*, 341 U.S. 123 (1951), certain organizations were labeled as communist by the United States Attorney General without notice or hearing, and in *Mathews v. Eldrige*, 424 U.S. 319 (1976), this Court held that an evidentiary hearing was *not* required prior to the denial of disability benefits. These cases cited by Macks have no application here.

Equally inapplicable are the cases cited by Macks regarding prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83 (1963) and *Alcotra v. Texas*, 355 U.S. 28 (1957) involved suppression of exculpatory evidence. In *Giglio v. United States*, 405 U.S. 150 (1972) and *Miller v. Pate*, 386 U.S. 1 (1967), the "prosecution" allowed its entire case to stand on false evidence. *Heckler v. Chaney*, 470 U.S. 821 (1985), dealt with the issue of judicial review of administrative agency discretionary actions, not prosecutorial misconduct, and is simply not on point.

Nor was Wernick's counsel an "interested prosecutor" in the sense of *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969), cited by Macks. The due process violations found in *Brotherhood* primarily related to inadequate notice and the manner in which the hearings were conducted. In holding the notice inadequate, the court in *Brotherhood* emphasized the uncertainty as to what was charged and the difficulty and delay in obtaining counsel, factors not present here. Moreover, in vacating the contempt finding in *Brotherhood of Locomotive Firemen,* the court took note of the fact that the original injunction was later invalidated as having been erroneously entered. *Id.* at 320.

Macks' reliance on *Young v. Vuitton,* 481 U.S. 787 (1987) is also to no avail. *Young v. Vuitton* concerned the federal district court's authority to appoint a private attorney to prosecute a criminal contempt under Fed. R. Crim. P. 42 (b). This is unlike the contempt proceeding against Macks, which involved neither the judicial appointment of a special prosecutor nor the court's inherent power to make such an appointment. The case at issue here "simply concerns the routine [state] practice of bringing contempts to the attention of the court by motion." *Sassower v. Sheriff of Westchester County,* 824 F.2d 184, 191 (2d Cir. 1987), distinguishing *Young v. Vuitton.*[5]

Young v. Vuitton does not recognize a due process right to a disinterested prosecutor in state court contempt proceedings.[6] This Court's plurality decision in *Young v. Vuitton* was not meant to apply to state court petty contempt proceedings for violations of state court procedural rules. The acts of Wernick's counsel in "initiating" the contempt proceeding by filing a Motion for Rule To Show Cause and in serving as proponent at the contempt hearing after the impartial judge determined to issue the Rule

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[5] *Sassower* involved a contemnor who, like Macks, was an attorney, and who persistently presented meritless claims, and after being convicted of criminal contempt appealed on due process grounds.

[6] Only Justice Blackmun thought that a constitutional question was raised. *Young v. Vuitton,* 481 U.S. at 814-815 (Blackmun, J. concurring).

to Show Cause are simply not analogous to the acts of the court-appointed special prosecutor in *Young v. Vuitton*. (*Young v. Vuitton* is discussed in more detail *infra*.)

B. "Prosecution" By Wernick's Counsel Did Not Prejudice Macks

1. The Broad Question Macks Presents for Review

Macks would have this Court hold that it is a *per se* due process violation for the states to permit prosecution of petty criminal contempts by private counsel who represent a party interested in the outcome. Such a holding would be tantamount to a prohibition of private prosecution of most petty criminal offenses in the state courts, for it is doubtful that anybody but an interested party would take the trouble to prosecute most petty offenses.

In *Bloom v. Illinois*, the Court reasoned that "serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule [not affording jury trials in contempt proceedings] is constitutionally infirm insofar as it permits *other than petty contempts* to be tried without honoring a demand for a jury trial." 391 U.S. at 198 (emphasis added). The Court in *Bloom v. Illinois* deliberately declined to extend the right to jury trial to petty contempts, just as the Court in *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968) on the same day retained the rule that petty crimes need not be tried to a jury. *See Bloom v. Illinois*, 391 U.S. at 210.

Macks would have this Court not only recognize a due process right to a disinterested prosecutor, but extend it to the states for serious as well as petty criminal offenses. "To take this course . . . would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism." *Bloom v. Illinois*, 391 U.S. at 213-214. The course Macks espouses

would wreak havoc upon established state court practice and render the state courts incapable of upholding their dignity, enforcing their rules or even their ministerial orders.

2. The Tradition of Private Prosecution In The State Courts

> The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. . . [i]n our insistence upon State observance of due process, we should, so far as possible, allow the greatest latitude for state differences. [The Constitution] requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

Bloom v. Illinois, 391 U.S. at 213-214.

As discussed *supra,* it is well-established in Illinois that counsel for an opposing party may prosecute a contempt. This is but one aspect of an extensive role in criminal law enforcement played by private prosecutors in the states. A study conducted by *Yale Law Journal* disclosed that in 30 jurisdictions appellate courts have decided that privately employed attorneys may assist the public prosecutor, while only 3 have said they may not. Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 *Yale L.J.* 209, 218-219 (1955) (hereinafter cited as *"Private Prosecution"* or *"Yale Law Journal"*). Illinois is one of the states that approve of such a role for private prosecutors. *Hayner v. People,* 213 Ill. 142, 72 N.E. 792 (1904).

Most states find authority for permitting private prosecution in the inherent power of the court to administer justice, while a few states have enacted statutes that give private parties the right to hire assistant prosecutors. *Private Prosecution* at 219.

Many states permit privately hired counsel to conduct criminal prosecutions alone with the permission of the public prosecutor and the trial court. *Id.* at 220.

3. The Need For Private Prosecution In State Court Petty Contempt Proceedings

Rather than dwelling on theoretical conflicts of interest in the private prosecutorial role, the *Yale Law Journal* was concerned with the actual failings and excesses of *public* prosecutors, pointing out that "[t]he decision not to prosecute can be implemented by mere inaction, acceptance of a compromise plea, or entry of a *nolle prosequi*." *Private Prosecution* at 209-210. The *Yale Law Journal* observed that "corruption, political ambition, or insufficiency of funds and personnel often motivate district attorneys to use these techniques to excess" and that "[s]uch abuse of the district attorney's discretion has created a substantial deficiency in criminal law enforcement." *Id.* at 210.

Over 25% of 151 public prosecutors from 45 states who responded to the *Yale Law Journal* questionnaire on prosecution procedures stated that they did not have enough time or help to conduct necessary prosecutions. *Private Prosecution* at 210 n.8. As of 1984, roughly 20,000 felony charges were being brought against individuals in Cook County every year. The Cook County State's Attorney's Office is responsible for review and prosecution of these felonies, and is also responsible for some 500,000 misdemeanors annually in the City of Chicago as well as misdemeanors committed in suburban Cook County (the Chicago Metropolitan Area). The State's Attorney's Office also acts as attorney for the Cook County Board and for all the various branches of county government. 1984 *Report of the Circuit Court of Cook County, Illinois* at 47.

During 1987, in the Municipal Department of the Circuit Court of Cook County, a total of 363,479 misdemeanors, ordinance and other petty violations were charged. Of these, 302,946 (83%) were disposed of without convictions (73% being dismissed for want of prosecution, nol-prossed, non-suited, stricken-off with leave to reinstate [similar to *nolle prosequi* in Cook County],

or discharged under the speedy trial statute), while only 60,533 (17%) resulted in conviction. Administrative Office of the Illinois Courts, 1987 *Annual Report to the Supreme Court of Illinois* at 242.

Faced with these numbing statistics concerning the disposition of petty offenses, it is unrealistic to assume that the Cook County State's Attorney would be able to meaningfully aide the Circuit Court of Cook County in enforcing its *ex parte* communications rule, not to mention its other rules and ministerial orders (such as those relating to court procedures, discovery in the conduct of litigation, etc.). Unless private counsel can "prosecute" contempts in the Cook County court system, the court will be unable to enforce its rules or orders. "The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory'. " *Young v. Vuitton,* 481 U.S. at 796, quoting *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 450 (1911).

4. Macks Has Failed to Demonstrate Any Actual Prejudice

Macks recognizes that he can show no actual prejudice by virtue of the "prosecution" of the contempt charge by Wernick's counsel:

> Even *in the absence of any objective evidence of an attempt to use the criminal proceedings to gain an advantage in the civil proceedings or an impairment of judgment based on conflicting duties,* the situation is so inherently coercive that, at a minimum, it creates an appearance of unfairness and impropriety.

Pet. at 10 (emphasis added). In other words, there was no attempt by Wernick to gain any advantage in the civil proceeding by reason of the contempt proceeding, nor is there any indication that Wernick's counsel acted improperly in the contempt proceeding.

In reviewing Macks' contention that a conflict of interest arose in "prosecution" of Macks by an "interested prosecutor"

(which Macks raised for the first time in his post-trial motion), the trial court ruled that the conflicts which "were inherent in the fact structure" of *Young v. Vuitton* "do not exist in the instant case." The trial court analyzed each of those in the context of this case, as follows:

Young v. Vuitton	*This Case*
In Young, the beneficiary of the court order prohibiting the trademark infringement was the party whose attorneys were appointed special prosecutor in the contempt action. Therefore, that party stood to gain significant financial and legal rewards by possibly bringing a tenuously supported prosecution. Indeed, the action would prevent further infringement resulting in increased profits to the party.	The result is not the same in the instant case. Here, the beneficiary of any contempt action is the court and not the private party. There are no injunctive orders beneficial to [Wernick] that are alleged to have been violated. Thus, [Wernick] does not stand to gain any financial or legal reward by prosecuting the contempt action.
In Young, the court was also concerned that the special prosecutor might abandon his quest to vindicate the court's authority if a fruitful settlement were proposed by the opposite party. The court argued that the prosecutor might decide to recommend that no charges be brought against the alleged contemnors if they would agree to a special prosecutor's settlement demands. In essence, the court was concerned that the special prosecutor would use the contempt proceeding as a bargaining chip.	There is simply no proof that the attorney for [Wernick] here will not vigorously attempt to vindicate the court's authority . . . This is of no concern to the court in the present case.

In Young, the alleged contumacious conduct was still under investigation giving the special prosecutor the bargaining chips he needed to demand the certain rewarding fruits.

In this case the investigation was complete and a Rule to Show Cause was granted. Since the Judge could have summarily punished [Macks] in his discretion, [Wernick] could not use the contempt action to his advantage. Any attempt to abandon the prosecution by [Wernick] would have resulted in the court attempting to vindicate its own authority. Therefore, [Wernick] does not stand in the same [position] to gain rewarding fruits by abandoning the prosecution of [Macks].

Finally, the court in *Young* was concerned that the special prosecutor might use the contempt action in order to gain material information in that case as well as information about a defamation action filed by petitioner against special prosecutor.

While there may have been information to be gleaned from the prosecution of the contempt action in Young, such is not the case here. The substance of [Macks'] *ex parte* communications with the Judge in the instant case was revealed in open court and while it related to the underlying probate proceeding, the information was not material. Therefore, [Wernick's counsel] were in no position to gain information beneficial to their client's interest.

Pet. App. at E-5 - E-6.

The Illinois Appellate Court also reviewed the record in light of *Young v. Vuitton* and Macks' contention that a conflict of interest arose in the "prosecution" of Macks by an "interested prosecutor", and held that "no conflict of interest arose" and that the contempt hearing "was properly conducted by [opposing]

counsel." 176 Ill. App. 3d at 159-160, Pet. App. at A-6, A-7.[7]

Even those commentators who have warned against potential conflicts of interest where a private attorney serves as prosecutor (and vice versa) have acknowledged that there is less possibility of unfairness to the defendant arising from the attorney's in-court activity than from his participation in the stages of a prosecution in which the prosecutor has greater discretionary power (i.e. investigation, determination whether to charge, grand jury, plea bargaining, etc.). This is because the

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[7] Macks' insinuation that Wernick's counsel violated ABA Model Code and Illinois Code of Professional Responsibility Rule 7-105 is without merit. Pet. at 10. Rule 7-105, which prohibits an attorney from threatening unwarranted criminal charges to obtain an advantage in a civil matter, do not apply to a situation where one party petitions the court to enforce a procedural rule by means of appropriate sanctions. 176 Ill. App. 3d at 159, Pet. App. at A-6. Asking the court to exercise its contempt power is *not* a threat of criminal prosecution to obtain advantage in a civil matter and clearly does not violate Rule 7-105.

Macks' assertion that his prosecution was in contravention of *Ill. Rev. Stat.* ch. 14, §6 (1987) is similarly without merit. Pet. at 9 n. That statute provides:

> Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same . . .

The statute clearly is inapplicable. Unlike *Sommer v. Goetze,* 102 Ill. App. 3d 117, 429 N.E.2d 901 (3rd. Dist. 1981) and *Gilbert v. People,* 121 Ill. App. 423 (3rd Dist. 1905), cited by Macks, this contempt proceeding did not involve or require the involvement of the attorney general or state's attorney. Moreover, Wernick's counsel was not appointed by the court as special prosecutor, but was proceeding under established precedent as counsel for a private litigant.

attorney's in-court actions are subject to closer judicial and public scrutiny.[8]

In the contempt proceeding against Macks, counsel for Wernick brought a Motion for Rule To Show Cause, but the impartial judge decided to *issue* the Rule to Show Cause. Thus, the impartial judge made the determination whether to prosecute the contempt and supervised the contempt proceeding. No prosecutorial discretion was vested in Wernick's counsel, who merely acted as the proponent at the contempt hearing.

C. *Young v. Vuitton* Does Not Apply To This Case

As discussed above, *Young v. Vuitton* was carefully considered by the trial court and the appellate court below, and they correctly concluded that it did not apply to this case. In *Young v. Vuitton,* the Court exercised its supervisory power over contempt prosecutions *in federal courts* in holding that counsel for a party who is the beneficiary of a court order cannot be appointed to prosecute a contempt action alleging a violation of that order. 481 U.S. 808-809. Macks relies upon *Young v. Vuitton* in petitioning this Court for certiorari based on a purported violation of his Fifth and Fourteenth Amendment rights, but *Young v. Vuitton* was not decided on constitutional grounds, and does not apply to the state.

Numerous other distinctions between this case and *Young v. Vuitton* have already been discussed. Fundamentally, as the Illinois Appellate Court observed, in *Young v. Vuitton* "winning the contempt order meant enforcement of the injunction, through extraordinary means, to the direct benefit of the party seeking

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[8] *See* Comment, *The Outmoded Concept of Private Prosecution,* 25 *Am. U.L. Rev.* 754, 773-774 (1976). ("If the private prosecutor's participation in the case is limited to in-court activity, there is little chance of prejudice resulting to the defendant, because the former's conduct is visible and governed by the same standards as is that of the regular prosecutor.") *Id.* at 791. *See also* Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure,* 54 *Fordham L. Rev.* 1141 (1986) ("The actual trial, because it is conducted before a judge, may be subject to less prosecutorial abuse.") *Id.* at 1159 n. 68.

the contempt." 176 Ill. App. 3d at 159, Pet. App. at A-6. Macks was found in contempt for violating a court rule and admonition, not a prior court order that benefited his opponent. The conduct for which Macks was found in contempt did not arise from a violation of a court order in which Wernick or his counsel had a proprietary interest. Wernick stood to benefit, if at all, only indirectly, as all honorable litigants benefit when the dignity of the court is upheld. As the trial court concluded, "the beneficiary of [this] contempt action is the court and not the private party." Pet. App. E-3.

In *Young v. Vuitton,* the Court was clearly troubled by the undercover "sting" operation carried out by the special prosecutor, in which more than 100 audio and video tapes were made of meetings and telephone conversations totally outside the supervision of the United States Attorney's office. *Young v. Vuitton,* 481 U.S. at 792. Also troubling was the fact that the consent decree in *Young v. Vuitton* contained a liquidated damages provision of $750,000 for violation of the injunction. As the Court observed, "[T]he prospect of such a damage award had the potential to influence whether Young was selected as a target of the investigation, whether he might be offered a plea bargain, or whether he might be offered immunity in return for his testimony." *Young v. Vuitton,* 481 U.S. at 805-806. The Court in *Young v. Vuitton* was further troubled by the fact that one of the special prosecutors was himself a defendant in a defamation action filed by one of the defendants in the underlying civil case whom he prosecuted for contempt. Thus, not only the party represented by the special prosecutor, but the *special prosecutor himself* had a direct interest. As the Court observed, "[t]his created the possibility that the investigation . . . might be shaped in part by a desire to obtain information useful in the defense of the defamation suit." *Young v. Vuitton,* 481 U.S. at 806.

In this case, the Illinois Appellate Court reviewed the record and concluded that "[t]he record categorically shows that Macks engaged in an *ex parte* communication . . . ," that "[t]he evidence amply supports the finding of contempt . . . ," that the evidence in the contempt hearing "clearly met" the reasonable doubt standard, that the contempt ruling "was based on substantial

evidence, . . ." that "Macks' behavior demonstrated, if not epitomized, the extreme circumstances in which a contempt finding is warranted . . . ," that Macks "was found guilty of contempt by overwhelming evidence . . . ," and that the contempt hearing "was properly conducted" by opposing counsel. 176 Ill. App. 3d at 157-160, Pet. App. at A-4 - A-7.

The conflicts of interest present in *Young v. Vuitton* are not present in this case. The contempt finding in this case is clearly supported by the evidence. Macks not only has failed to demonstrate actual prejudice, he has essentially conceded there was none.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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